

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AUGUSTUS NELSON,
CDCR #C-66719,

Plaintiff,

vs.
ARMANDO FAVILA, et al.,

Defendants.

Civil No. 07-0958 L (RBB)

**ORDER DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
and § 1915A(b)**

I. Procedural History

On May 24, 2007, Plaintiff, a state prisoner currently incarcerated at the California Substance Abuse Treatment Facility in Corcoran, California, and proceeding pro se, filed a civil rights action pursuant to 42 U.S.C. § 1983. The Court granted Plaintiff's Motion to Proceed *In Forma Pauperis* ("IFP") but sua sponte dismissed his Complaint for failing to state a claim upon which relief could be granted pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). (*See* July 2, 2007 Order at 5-6.) Plaintiff was granted leave to file a First Amended Complaint in order to be able to correct the deficiencies of pleading identified by the Court in its Order. (*Id.* at 6.)

After granting Plaintiff an extension of time, Plaintiff filed his First Amended Complaint ("FAC") on October 4, 2007. However, Plaintiff's First Amended Complaint continues to suffer from the same deficiencies of pleading previously identified by the Court.

1 **II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

2 As the Court stated in its previous Order, notwithstanding IFP status or the payment of
 3 any partial filing fees, the Court must subject each civil action commenced pursuant to 28
 4 U.S.C. § 1915(a) to mandatory screening and order the sua sponte dismissal of any case it
 5 finds “frivolous, malicious, failing to state a claim upon which relief may be granted, or
 6 seeking monetary relief from a defendant immune from such relief.” 28 U.S.C.
 7 § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of
 8 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122,
 9 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but
 10 requires” the court to sua sponte dismiss an *in forma pauperis* complaint that fails to state a
 11 claim).

12 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte
 13 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as
 14 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant
 15 to the IFP provisions of section 1915 make and rule on its own motion to dismiss before
 16 directing the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(2). *See Calhoun*,
 17 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601,
 18 604-05 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur
 19 “before service of process is made on the opposing parties”).

20 “[W]hen determining whether a complaint states a claim, a court must accept as true
 21 all allegations of material fact and must construe those facts in the light most favorable to the
 22 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194
 23 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure
 24 12(b)(6)’’); *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe
 25 a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th
 26 Cir. 1988), which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963
 27 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights
 28 complaint, however, the court may not “supply essential elements of claims that were not

1 initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
 2 Cir. 1982).

3 **A. Fourteenth Amendment Claims - Due Process**

4 As Plaintiff did in his previous Complaint, he alleges that prison officials denied him
 5 due process when they categorized a disciplinary action as a serious rules violation. (*See*
 6 FAC at 7-19.) As the Court previously informed Plaintiff, in order to invoke the due process
 7 clause of the Fourteenth Amendment, he must first demonstrate to the Court that he can show
 8 a liberty interest at stake. (*See* July 2, 2007 Order at 4.) Specifically, the Supreme Court
 9 held in *Sandin v. Conner*, 515 U.S. 472, 483 (1995) that a prisoner can show a liberty interest
 10 under the Due Process Clause of the Fourteenth Amendment only if he alleges a change in
 11 confinement that imposes an “atypical and significant hardship . . . in relation to the ordinary
 12 incidents of prison life.” *Id.* at 484 (citations omitted); *Neal v. Shimoda*, 131 F.3d 818, 827-
 13 28 (9th Cir. 1997).

14 In his First Amended Complaint, Plaintiff alleges that he could potentially suffer
 15 “atypical and significant hardship” if he is denied parole as a result of a guilty finding based
 16 on a rules violation report. (*See* FAC at 13.) However, Plaintiff does not allege that he was
 17 ever denied parole, much less allege that he was denied parole because of the disciplinary
 18 hearing relating to the serious rules violation report. Thus, his claims are speculative and he
 19 has failed to meet the “atypical and significant hardship” threshold as set forth under *Sandin*.
 20 Accordingly, the Court must, once again, dismiss Plaintiff’s Fourteenth Amendment due
 21 process claims for failing to state a claim upon which § 1983 relief can be granted.

22 **B. Fourteenth Amendment - Equal Protection claims**

23 In his First Amended Complaint, Plaintiff also alleges he has been denied his right to
 24 equal protection under the Fourteenth Amendment. (FAC at 23.) The “Equal Protection
 25 Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person
 26 within its jurisdiction the equal protection of the laws,’ which is essentially a direction that
 27 all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living*
Center, Inc. 473 U.S. 432, 439 (1985). In order to state a claim under § 1983 alleging
 28 violations of the equal protection clause of the Fourteenth Amendment, Plaintiff must allege

1 facts which demonstrate that he is a member of a protected class. *See Harris v. McRae*, 448
 2 U.S. 297, 323 (1980) (indigents); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.
 3 432, 440-41 (1985) (listing suspect classes). Plaintiff has not alleged that he is a member of
 4 a protected class, nor has he plead facts to demonstrate that the Defendants acted with an
 5 intent or purpose to discriminate against him based upon his membership in a protected class.
 6 *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998), *cert. denied*, 525 U.S. 1154
 7 (1999). Plaintiff has also failed to allege sufficient facts which may prove invidious
 8 discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Development*
 9 *Corp.*, 429 U.S. 252, 265 (1977). Accordingly, the Court dismisses Plaintiff's Fourteenth
 10 Amendment equal protection claims for failing to state a claim upon which § 1983 relief can
 11 be granted.

12 Thus, the Court finds that Plaintiff's First Amended Complaint fails to state a section
 13 1983 claim upon which relief may be granted, and is therefore subject to dismissal pursuant
 14 to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). Because it is not altogether certain that Plaintiff
 15 would be unable to allege any additional facts related to the conditions under which he was
 16 injured, however, the Court will provide Plaintiff with an opportunity to amend his pleading
 17 in light of the standards set forth above. *See Lopez*, 203 F.3d at 1130-31.

18 III. Conclusion and Order

19 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

20 Plaintiff's First Amended Complaint is **DISMISSED** without prejudice pursuant to 28
 21 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45)
 22 days leave from the date this Order is "Filed" in which to file a Second Amended Complaint
 23 which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint
 24 must be complete in itself without reference to the superseded pleading. *See S.D. Cal. Civ.*
 25 L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint
 26 will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).
 27 Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be
 28 granted, it may be dismissed without further leave to amend and may hereafter be counted

1 as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th
2 Cir. 1996).

3 The Clerk of the Court is directed to mail a Court approved form § 1983 complaint to
4 Plaintiff.

5 **IT IS SO ORDERED.**

6 DATED: January 10, 2008

7 
8 M. James Lorenz
United States District Court Judge

9 COPIES TO:

10 HON. RUBEN B. BROOKS
UNITED STATES MAGISTRATE JUDGE

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12 ALL COUNSEL/PARTIES

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